



de maximis, inc.

186 Center Street
Suite 290
Clinton, NJ 08809
(908) 735-9315
(908) 735-2132 FAX

July 31, 2013

Stephanie Vaughn
Lower Passaic River Restoration Project
U.S. Environmental Protection Agency, Region II
290 Broadway
New York, NY 10007

Via Electronic Mail

**Re: Notice of Force Majeure
Bridge Street Bridge - Hurricane-Sandy Related Repairs
River Mile 10.9 Removal Action
CERCLA Docket No. 02-2012-2015**

Dear Ms. Vaughn:

This letter responds to your July 15, 2013 letter wherein EPA agrees to a schedule change for the River Mile (RM) 10.9 removal action but disagrees that the event is a *force majeure* event.

Paragraph 51 of the RM 10.9 Administrative Order on Consent (AOC) states that a *force majeure* is "defined as any event arising from causes beyond the control of Settling Parties, or of any entity controlled by Settling Parties, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Settling Parties' best efforts to fulfil the obligation."

The event at issue here is additional damage to the motors on the Bridge Street Bridge (BSB). This damage was not known to the BSB owners/operators (Essex and Hudson Counties), and thus not known to the CPG's contractors, at the time the original BSB repairs were contemplated in April of 2013. Neither the Settling Parties nor its contractors has any responsibility or control over the BSB or the repairs to the BSB. Drawbridges must open for the passage of vessels when a proper request or signal is given, and in the case of the BSB, it shall open on signal if at least four hours notice is given. See 33 CFR § 117.5, § 117.739. If a drawbridge becomes inoperable, "the drawbridge owner must notify the District Commander of the closure without delay," and perform repair work "with all due speed in order to return the drawbridge to operation as soon as possible." 33 CFR § 117.36. The District Commander, in turn, will notify mariners about the status through Notices to Mariners. 33 CFR § 117.36(b). Here, even when the BSB owners/operators became aware of the issue, they did not provide notice to the District Commander, and therefore, the bridge operability has not been included in the Local Notices to Mariners.

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While the CPG understands EPA's concern about the level of communications during the month of May, such concern does not alter the basic tenet of a *force majeure* event, i.e., that the event arises from causes beyond the control of the Settling Parties.

Since early June, the CPG, through its contractors, has been in communication with various owners, operators and maintenance providers for all bridges on the Lower Passaic River, including the BSB. Lower Passaic River bridge operators and owners include Amtrak, Conrail, NJDOT, NJ Transit, Bergen, Essex and Hudson Counties. To say that it has been difficult to nail down concrete information in light of all of the players and moving pieces regarding all of these bridges is an understatement. Yet, the CPG's contractors have worked to maintain communications and offered resources and assistance to streamline the BSB repairs. These offers have been met with appreciation, but have not been accepted to date. The CPG cannot force such acceptance as the CPG does not have EPA's enforcement authority. Furthermore, the CPG understands that the repairs to the BSB motors required that the motors be shipped to a rework facility in Ohio to complete the repair work. According to the BSB owners/operators and their electrical contractor, the repair had to be redone when the incorrect specifications were used to rewind the motors. As a result, the delivery date was further extended beyond the promised delivery date – an event clearly beyond the control of the Settling Parties. As a result, the CPG respectfully disagrees with EPA's interpretation that this is not a *force majeure* event.

As you are aware, the CPG has been providing EPA with verbal and written reports on an almost daily – and in some cases hourly – basis. After weeks of discussion and requests to meet with the BSB owners/operators, the CPG was able to meet with the engineers of both counties on July 18. During that meeting, the CPG was able to work with the counties regarding an alternative method of opening the BSB to allow for the RM 10.9 mobilization. On July 19, the day after meeting with the BSB owners, the CPG witnessed a "manual" opening of the BSB, following which Mr. Khai Leong, Hudson County Engineer, stated that he was confident that the BSB can be opened for a one-time mobilization.

The CPG's contractors have made every effort to coordinate mobilization of equipment up to RM 10.9 on the late evening of July 29 and early morning of July 30. As you know from email reports, mobilization to RM 10.9 was successfully completed in the early morning of July 30, including opening of the BSB.

The CPG's understanding was that the BSB motors would be shipped on July 26 from Ohio and arrive in the area on July 30. However, as we reported to EPA, the CPG was notified by Essex and Hudson Counties' contractor on July 26 that the BSB motors would instead be shipped on July 29. As of today, the CPG has not yet received confirmation that the motors have shipped.

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Following mobilization, the bridge owners/operators have indicated that they will open the BSB using the temporary motor and clutch assembly until the permanent motors are received. Upon receipt of the motors, the CPG understands from the owners/operators that the BSB will be inoperative for 2 to 3 days to allow for the removal of the temporary motor and clutch and the installation and testing of the permanent equipment. If the motors are received after dredging commences, this will result in some delay in moving barges up and down the river.

While the CPG is mobilizing and setting up the dredging equipment at the Removal Area, the repairs for the BSB may occur on a parallel timetable, assuming the motors arrive as planned. Therefore, while fully reserving all arguments and defenses about EPA's interpretation of the implementation timeline, the CPG believes it has begun work by mobilizing barges and setting up perimeter air monitoring on July 30 and installing silt curtain on July 31 and August 1, all in advance of EPA's August 2, 2013 deadline. The CPG will keep EPA apprised of any developments that may impact this schedule.

As we have also discussed, there are three outstanding approvals/permits that should be provided to the CPG in advance of dredging, which is currently estimated to start on Friday August 2.

- EPA's final approval of the Removal Action final Design; CPG intends to submit a revised final design today which will address EPA's final comments;
- NJDEP has not provided a final Waterfront Development Permit Equivalent to the CPG for the Removal Action; and
- The NJ Tidelands Council has not provided documented final action on the CPG's Tidelands application.

The CPG requests that EPA assist and ensure that these approvals and permit equivalents are provided in writing in advance of dredging starting on August 2.

EPA has requested that the CPG prepare a contingency plan for mobilization/demobilization and sediment transport downriver. Per our discussions, there are no alternatives to barge transport that would enable the RM 10.9 removal action to take place in 2013. However, as discussed above, the CPG implemented a plan to mobilize during the early morning hours of July 30. This plan includes the opening of ten (10) bridges (including BSB) to accommodate the large mobilization equipment. The six bridges operated by NJDOT, NJ Transit, Conrail and Amtrak are reported to be in working order, according to these entities. The DeJessa Avenue Bridge operated by Essex and Bergen Counties is also reported to be fully operational. The CPG has worked with the BSB owners/operators to accommodate a "manual" opening for mobilization. The Clay Street Bridge and Jackson Street Bridge have operating issues, but according to the Hudson and Essex County engineers, these can currently be opened and

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closed. To increase the reliability of these bridges during the rest of River Mile 10.9 activities, the CPG is again working with the appropriate contacts to understand the extent of the issues and determine if any assistance can be provided.

The following conditions, limitations and constraints have been considered to support routine dredging and capping operations:

- **Equipment Sizing** – low air-draft equipment (tugs and barges) are not readily available in a timeframe that would meet the project schedule, so the work cannot feasibly be done this year without any bridge openings. As discussed in more detail below, the CPG believes that the most efficient way to reduce the number of times that the bridges are opened (and thus potentially reduce the risk of bridge malfunction or failure) is to use larger equipment, which means openings are required for 10 Passaic River and 1 Hackensack River bridges.
- **Bridge Reliability** - Bridge operators, especially Essex and Hudson Counties, are concerned about frequent bridge openings (more than once per day) over approximately 4 months. Many of the bridges are very old and are not operated on a regular basis. The CPG's proposed approach attempts to strike a balance between the number of bridges opened and the number of times bridges are opened. The BSB must be operational on August 2 to begin routine dredging operations.
- **Bridge Openings and Vehicle Traffic** - Frequent bridge openings other than during overnight hours (11 PM to 5 AM) are likely to cause significant traffic back-up and congestion. As noted previously, some of the traffic safety equipment on the Essex and Hudson County bridges is not currently functioning. EPA may consider using its enforcement authority to direct that traffic safety equipment be repaired.
- **RM 8/Second River Rock Outcrop** – This feature near the Second River requires barge movement during periods other than low tide in order for the barges to get "lined up" for bridge approaches.

The CPG proposes the following approach, which relies on barges capable of carrying two days' volume of dredge production and reduces the opening of 10 Passaic River bridges and 1 Hackensack River bridge to only once per day. A barge is moved down the Passaic River to Clean Earth on the Hackensack on one night and a second barge is moved up the Passaic River from Clean Earth on the next night. This will routinely result in only 6 openings of the 10 Passaic River and 1 Hackensack River bridges per week.

An alternative approach is a "step-down" in barge capacity that could take only one day's dredge production and would require twice daily openings - an opening for the downriver transit and an opening for the upriver movement of a barge. The size of equipment needed to safely navigate the Passaic River would still require bridge openings because of the air draft of both barges and tugs. The CPG and its contractors have selected the first approach in order to

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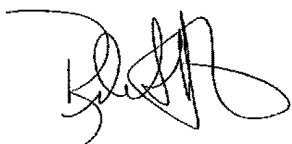
minimize bridge openings and provide more than one day's capacity for dredging at the Removal Area.

Finally, in the event of an extended bridge failure, smaller scows that could fit under the bridges may be feasible; however, only one is currently available and requires further modification to reduce its air draft. While additional temporary small barges could be manufactured using deck barges and adding I-beam walls, it would require several weeks to manufacture these additional barges. This alternative should only be implemented in the event of a long-term failure of a bridge. Even if these barges were to be used, they would result in a much lower production rate, which would extend the schedule. Furthermore, the need to push them under the inoperative bridge(s) at low tide would require managing river transits and navigation hazards that exist at low tide (Second River/RM 8 outcrop) and might require barge transit on a 24 hour basis.

Based on the foregoing and since the mobilization was completed, the CPG does not believe that anything more in terms of a contingency plan for mobilization is necessary. Please let the CPG know if Region 2 requires any further information.

We look forward to working closely with you toward the successful completion of this project.

Very Truly Yours,
de maximis, inc.



Robert H. Law, Ph.D.
CPG Project Coordinator

cc: Ray Basso, EPA
CPG Members
William Hyatt, CPG Coordinating Counsel
Willard Potter, de maximis, inc.